IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1111

THE PEOPLE OF THE
STATE OF COLORADO,
Petitioner,

v.

WILLIAM (RUSTY) BRAMLETT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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INDEX

CASES

INDEX — Continued

INDEX — Continued

STATUTES

CONSTITUTION

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OPINIONS BELOW

The opinion of the Colorado Supreme Court, as modified, is appended to this petition as Appendix A. It is not yet reported. The original opinion before modification is appended as Appendix B.

JURISDICTION

The decision sought to be reviewed originally was entered on October 31, 1977. The People filed a timely petition for rehearing which was denied, and the opinion was modified, on November 28, 1977. The defendant-appellant below, William (Rusty) Bramlett, filed a petition for rehearing on December 4, 1977 and that petition was denied on December 27, 1977. The Colorado Supreme Court has stayed its mandate pending the filing of this petition for certiorari.

Jurisdiction to review the Colorado Supreme Court's decision is conferred on this Court by 28 U.S.C. section 1257(3).

QUESTION PRESENTED FOR REVIEW

Does the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibit Colorado from punishing the felony of first-degree assault more severely than the misdemeanor of criminally negligent homicide when both offenses are committed in the good faith but unreasonable belief that self-defense was necessary?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 3:

> . . . Nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Assault in the first-degree as defined in C.R.S. 1963, 40-3-202(1)(a) (1971 Perm. Supp.), now C.R.S. 1973, 18-3-202(1)(a):

> A person commits the crime of assault in the first-degree if:
>
> (a) With intent to cause serious bodily injury to another person, he causes serious injury to any person by means of a deadly weapon.

Criminally negligent homicide as defined in C.R.S. 1963, 40-3-105(1)(b) (1971 Perm. Supp.), now C.R.S. 1973, 18-3-105(2)(b):

> A person commits the crime of criminally negligent homicide if he causes the death of another person: . . .
>
> (b) He intentionally causes the death of a person in the good faith but unreasonable belief that one or more grounds for justification exist under sections 40-1-801 to 40-1-807 [now, sections 18-1-701 to 18-1-707].

Use of physical force in defense of a person as defined in C.R.S. 1963, 40-1-804 (1971 Perm. Supp.), now C.R.S. 1973, 18-1-704:

> (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that person, and he may use a degree of force

which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or any other person, is in imminent danger of being killed or receiving great bodily harm . . .

STATEMENT OF THE CASE

Rusty Bramlett was convicted of first-degree assault when he shot at close range and seriously injured Layla Day, a woman who was a customer at a service station which Bramlett managed. Bramlett's shooting spree, in which he also wounded another customer, climaxed Bramlett's violent objection to the customers' failure to keep a dog on a leash.

The bizarre events began when Layla Day, James Frick, Patricia Wisely, Wisely's small child and a dog stopped at Bramlett's service station to buy gasoline and let Frick's dog out of the vehicle. Bramlett had posted his station with various crudely lettered signs regarding dogs including one which read: "We won't be responsible if your dog gets killed, the Management, Thank you." (ff. 259-261). Bramlett was holding a rifle when the Frick party pulled into the station (ff. 52, 91). When he saw the unleashed dog, Bramlett threatened to kill the dog unless it was leashed or put back into the vehicle (f. 91). Day protested and argued with Bramlett but she and Frick complied with his demand and put the dog in the van (f. 148).

Meanwhile Bramlett went into the service station office, exchanged his rifle for a hand gun, and came out shooting. One shot hit the ground and a second shot hit Frick in the hip (ff. 52, 148, 240). While Bramlett waved his gun about, Patricia Wisely, carrying her baby, ran into the service station to call the sheriff for help. Bramlett and the others followed her into the station. A struggle ensued when Bramlett grabbed the telephone away from Wisely. Bramlett knocked Frick to the ground and fired a shot at Layla Day, hitting her in the arm and breast (ff. 94-95).

At trial, Bramlett contended that he acted in self-defense and that he thought Layla Day had a knife (f. 238). Day testified that she had no knife and said she stepped between Bramlett and Patricia Wisely to shield the Wisely child from Bramlett (f. 94). Both Frick and Wisely also testified that neither was armed, and no knife was found at the scene (ff. 78, 96, 150). The only other eyewitness, Bramlett's wife, testified that although she saw Day's hand raised she did not see a knife (f. 206).

The jury was properly instructed on first-degree assault and on the defendant's theory of self-defense. No instruction on the good faith of the defendant was requested or given. A verdict of guilty to first-degree assault was returned by the jury and Bramlett was sentenced to a term of five to ten years in the state penitentiary (ff. 69-72, 77-80).

Bramlett moved to set aside his conviction on the ground that first-degree assault, C.R.S. 1963, 40-3-202 (1)(a) (1971 Perm. Supp.), now C.R.S. 1973, 18-3-202 (1)(a) was unconstitutional as applied to him (ff. 138, 128-134). Bramlett argued that he had shot Layla Day in the good faith but unreasonable belief that he was acting

in self-defense and that, if Day had died, he would have been guilty only of criminally negligent homicide, C.R.S. 1963, 40-3-105(1)(b) (1971 Perm. Supp.), now C.R.S. 1973, 18-3-105(1)(b). Since criminally negligent homicide is a class 1 misdemeanor and first-degree assault is a class 3 felony, Bramlett argued that he was denied equal protection of the law by being punished more severely in a case in which the victim lived than he would have been if the victim had died. A class 3 felony is punishable by five to forty years' imprisonment. C.R.S. 1973, 18-1-105(1). A class 1 misdemeanor is punishable by six months to twenty-four months' imprisonment or a $500 to $5,000 fine or both. C.R.S. 1973, 18-1-106. The trial court denied his motion (ff. 135-137) and Bramlett appealed.

The Colorado Supreme Court reversed the conviction and directed a new trial after holding the first-degree assault statute unconstitutional as applied. The sole issue raised and decided by the court was the constitutionality of the statute under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. No reliance was placed on the Colorado Constitution and no independent state ground exists for the decision.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review the novel and, we submit, fundamentally unsound, equal protection standard formulated by the Colorado Supreme Court in this case. Because a state supreme court is prohibited from construing a provision of the United States Constitution more strictly than it has been construed by this Court, *Oregon v. Haas*, 420 U.S. 714, 719 (1975), this is an appropriate case for this Court to exercise its supervisory function and reverse the decision below.

The essence of the state court's decision is found at pp. 18-19 of Appendix A:

> In the present case, the intent and conduct proscribed by the first-degree assault statute and subsection (b) of the criminally negligent homicide statute are not sufficiently distinguishable to justify a greater penalty when that conduct results in serious bodily injury rather than in death. The penalty prescribed for persons convicted of first-degree assault who establish that their actions were done in the good faith, but unreasonable belief, that justification existed is, therefore, unconstitutional as a denial of the equal protection of the law.
>
> It is clearly within the legislature's prerogative to establish the penalties and the defenses which shall apply to specific criminal offenses but legislative enactments are always subject to constitutional constraints. In this case, we extend one such legislatively created defense to the crime of first-degree assault bcause that defense is available under the criminally-negligent homicide statute and both statutes proscribe similar conduct and intent.

The basic holding of the decision is that assault cannot be punished more severely than homicide when the two defendants' conduct and intent are similar. The court characterized the "unreasonable but good faith belief" definition of criminally negligent homicide as a defense and, as an apparent corollary to its main holding, also held that the same defense must be provided to assault. Neither the holding nor its corollary is well founded.

Contrary to the holding, the federal Equal Protection Clause is not violated by punishing "similar" crimes differ-

ently. Even if first-degree assault and criminally negligent homicide are committed under similar circumstances, the two are different crimes. The elements of proof are different; the results of the crimes (serious bodily injury versus death) are different.

Additionally, the stigma and potential consequences of conviction in a homicide case are radically different from the consequences of conviction in an assault case. In the first instance, the defendant may be put to death if he is convicted of first-degree murder. C.R.S. 1973, 18-1-105(1). In the second, he may only receive a maximum sentence of forty years if convicted of first-degree assault. The law has always treated a defendant who faces the possibility of capital punishment differently from other defendants and has extended greater procedural safeguards to the former. (For example, the number of peremptory challenges is greater in a capital case.)

Self-defense, of course, is a complete defense to homicide. But self-defense, as defined in C.R.S. 1963, 40-1-804 (1971 Perm. Supp.), now C.R.S. 1973, 18-1-704, requires that the defendant act reasonably, both in his apprehension of the danger presented by the other person and in the amount of force which he uses against that person. If the jury does not find that the defendant acted reasonably, it cannot acquit him. In view of the dire consequences of a first-degree murder conviction, it is not irrational or illogical to provide an alternative in the form of a lesser degree of homicide for the defendant who acts unreasonably but in the good faith belief that he is acting in self-defense. Manslaughter plays that role in some jurisdictions. *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973), *cert. denied* 414 U.S. 1007 (1973). As discussed in n. 1 *infra*, the origin of Colorado's "unreasonable but good faith" definition of homicide actually was a Colorado Supreme Court

decision involving manslaughter. *Sanchez v. People*, 172 Colo. 168, 470 P.2d 857 (1970).

The same compelling reasons for finding a middle ground between conviction and acquittal do not apply to assault. For this reason, common law mitigating defenses to murder such as heat of passion have been held inapplicable to assault. *Commonwealth v. Rife*, 454 Pa. 506, 312 A.2d 406 (1973); *State v. McKeehan*, 91 Idaho 808, 821, 430 P.2d 886, 899 (1967). By analogy, the "unreasonable but good faith" defense should not extend to assault.

One who commits first-degree assault simply is not similarly situated to one who commits criminally negligent homicide and therefore the conditions for application of the Equal Protection Clause do not arise. As this Court has stated, "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). Simply "showing that different persons are treated differently is not enough, without more, to show a denial of equal protection." *Griffin* v. *School Board*, 377 U.S. 218, 230 (1964).

Traditionally this Court has held that a state legislature has wide latitude in fixing punishments for state crimes. *Williams* v. *Illinois*, 399 U.S. 235, 241 (1970). It has stated repeatedly that the courts are not "super-legislatures" which sit in review of the legislature's assessment of the relative gravity of criminal offenses. *Collins* v. *Johnston*, 237 U.S. 502, 510 (1914). *Accord Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937). As this Court stated in *Williams* v. *Oklahoma*, 358 U.S. 576, 586 (1959):

> But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution,

require a State to fix or impose any particular penalty for any crime it may define or to impose the same or "proportionate" sentences for separate and independent crimes.

Cf. Bell v. *United States*, 349 U.S. 82, 83 (1955).

In *Collins* v. *Johnston*, *supra*, this Court found that California did not deny the defendant equal protection of the law by punishing perjury more severely than other crimes which the defendant contended were of greater gravity and had more injurious consequences. Similarly, a lower federal court in *Tedder* v. *Cox*, 317 F. Supp. 33 (W.D. Va. 1970), found no violation of the Equal Protection Clause where the crime of forging bank notes had a different, higher sentence than crimes of forging other instruments. Recently several federal appellate decisions have upheld a mandatory twenty-five year sentence for postal robbery over the contention that other robbery crimes were punished less severely. *Smith* v. *United States*, 284 F.2d 789 (5th Cir. 1960); *United States* v. *Beverley*, 416 F.2d 263 (9th Cir. 1969); *United States* v. *Wilson*, 506 F.2d 521 (9th Cir. 1974). The same result has been reached in other cases. *See United States* v. *Randolph*, 261 F.2d 234 (7th Cir. 1958), *cert. denied* 359 U.S. 949 (1959) (upholding, under Equal Protection Clause, Illinois statute punishing one who helps prisoner escape according to penalty received by escapee). *See also Gibson* v. *Dell*, 443 F.2d 75 (9th Cir. 1971) (no denial of equal protection when judge or jury can fix a crime as a felony or misdemeanor depending on sentence).

The holding here that the federal Equal Protection Clause requires equal penalties for crimes committed by defendants having substantially similar intent and conduct, would necessitate a massive revision of the criminal

law. The constitutionality of habitual criminal sentence laws, said to be "no longer open to serious challenge" in *Oyler* v. *Boles*, 368 U.S. 52, 53 (1962), again would be called into question as would be the constitutionality of classifications like those upheld in the lower federal court cases cited above. If this is the constitutional test of the future, the courts have assumed a Herculean task — one which this Court has declined to undertake for federal statutes. *Bell* v. *United States*, *supra*. As the Fifth Circuit observed in *Smith* v. *United States*, *supra* at 791, the implications of accepting this type of constitutional contention are "awesome."

Like its main holding, the corollary to the decision cannot be supported by the Equal Protection Clause. In the opinion, the Colorado Supreme Court extended the "unreasonable but good faith belief" homicide defense to assault.[1]

No authority is cited for this proposition, and, we submit, it has no constitutional basis. *Patterson* v. *New York*, 97 S.Ct. 2319 (1977), implies that the states have wide discretion to create affirmative defenses not found in the common law, just as they have discretion to fix the penalties for crimes. *See also Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942). Having provided a defense in mitigation to one crime at the behest of the court, the legislature is not compelled to provide the same defense to a separate crime. *Hart* v. *Virginia*, 298 U.S. 34 (1935) (per curiam).

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[1]The opinion is openly critical of the legislature for defining criminally negligent homcide as including killing in the unreasonable but good faith belief that one is acting in self-defense. According to the opinion, the definition reflects the extreme minority view. Appendix A at p. 20. It should be noted that the legislature merely codified in 1971 the "unreasonable but good faith" homicide definition created by the Colorado Supreme Court in *Sanchez v. People*, 172 Colo. 168, 470 P. 2d 857 (1970).

The Equal Protection Clause does not require such parallelism in the definition of crimes.

The inherent danger of this decision is the Colorado Supreme Court's failure to exercise the judicial restraint mandated by this Court's decisions. *Salzburg* v. *Maryland*, 346 U.S. 545, 550 (1954). The state court *has* acted as a "super-legislature;" it *has* acted as a censor of the legislature. Using its great power as the highest court of the state, it has invalidated a statutory classification not because of any compelling constitutional requirement but because of its disagreement with the wisdom of the legislation which it caused to be created. *Sanchez* v. *People*, *supra*. This Court should not permit the federal constitution to be so flagrantly misused.

CONCLUSION

For the reasons discussed above, the petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF
COLORADO

NO. 27257

THE PEOPLE OF THE
STATE OF COLORADO — Plaintiff-Appellee,
v.
WILLIAM (RUSTY) BRAMLETT,
Defendant-Appellant.

Appeal From the District Court of Sedgwick County
Honorable Waino Johnson, Judge

EN BANC

JUDGMENT REVERSED AND
CAUSE REMANDED WITH
DIRECTIONS

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MR. JUSTICE ERICKSON
delivered the Opinion of the Court.

The defendant appeals a conviction for first-degree assault under 1971 Perm. Supp., C.R.S. 1963, section 40-3-202(1)(a).[1] The only issue raised on appeal concerns the constitutionality of the penalty for first-degree assault as applied to defendants who can establish that they acted with a good faith, but unreasonable belief, that justification existed to use force.

Defendant was the manager of a service station near Ovid, Colorado. On May 4, 1973, several persons in a van pulled into the service station. An argument ensued during which the defendant shot one of the persons with a .22 caliber revolver. Trial to a jury resulted in a verdict of guilty of first degree-assault. Defendant's motion to set aside the judgment on the ground that the statute was unconstitutional was denied. Defendant appeals. We reverse and remand with directions to grant the defendant a new trial.

The defendant argues that the penalty under the first-degree assault statute is unconstitutional as applied to certain defendants because it can result in a greater penalty for essentially the same conduct proscribed by the criminally-negligent homicide statute. 1971 Perm. Supp., C.R.S. 1963, section 40-3-105.[2] He contends that a person who acts in the good faith, but unreasonable belief, that justification exists to use force in self-defense cannot constitutionally be subjected to a greater sentence when he causes serious bodily injury than if he had caused the death of his purported assailant. We agree.

1971 Perm. Supp., C.R.S. 1963, section 40-3-202, provides, in part:

[1]Now section 18-3-202(1) (a), C.R.S. 1973.
[2]Now section 18-3-105, C.R.S. 1973. This statute has since been amended by H.B. 1654 (1977).

"(1) A person commits the crime of assault in the first degree if:

"(a) With intent to cause serious bodily injury to another person, he causes serious injury to any person by means of a deadly weapon."

Assault in the first degree is a class three felony which carries a minimum sentence of five years and a maximum sentence of forty years in the state penitentiary. 1971 Perm. Supp., C.R.S. 1963, section 40-1-105.[3]

The defendant interposed a defense of self-defense as authorized by 1971 Perm. Supp., C.R.S. 1963, sections 40-1-804(1):[4]

"Except as provided in subsection (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose."

This defense is expanded to include unreasonable beliefs to reduce the degree of culpability in cases in which death results by the criminally-negligent homicide statute:

"1971 Perm. Supp., C.R.S. 1963, section 40-3-105.

"(1) A person commits the crime of criminally negligent homicide if he causes the death of another person:

[3]Now section 18-1-105, C.R.S. 1973.
[4]Now section 18-1-704(1), C.R.S. 1973.

"(a) By conduct amounting to criminal negligence; or (b) He intentionally causes the death of a person in the good faith but unreasonable belief that one or more grounds for justification exist under sections 40-1-801 to 40-1-807."[5]

Criminally-negligent homicide is a class one misdemeanor which carries a penalty of from six months to two years in jail. 1971 Perm. Supp., C.R.S. 1963, section 40-1-106.[6]

The defendant relies on *People* v. *Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975), in which we held the manslaughter statute unconstitutional because its intent requirement was not sufficiently distinguishable from the intent requirement for the lesser included offense of criminally-negligent homicide. In *Calvaresi*, we declared:

"Equal protection of the law is a guarantee of like treatment of all those who are similarly situated. Classification of persons under the criminal law must be under legislation that is reasonable and not arbitrary. There must be substantial differences having a reasonable relationship to the persons involved and the public purpose to be achieved. *Dunbar* v. *Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970). A statute which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws. *See People* v. *McKenzie*, 169 Colo. 521, 458 P.2d 232 (1969); and *State* v. *Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955), and cases cited therein."

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[5]H.B. 1654 (1977) amended section 18-3-105, C.R.S. 1973, substituting "knowingly" for "intentionally."
[6]Now section 18-1-106, C.R.S. 1973.

The validity of the approach set forth in *Calvaresi* was reaffirmed in *People* v. *Dominguez*, ... Colo. ....., 568 P.2d 54 (1977). In *Dominguez*, we held a portion of the first-degree assault statute unconstitutional because the type of conduct proscribed under the statute was not substantially different from the conduct proscribed under the second-degree assault statute.

The prosecution attempts to sustain the validity of the penalty under the first-degree assault statute in the present case on the ground that the two statutes establish distinct crimes which require proof of different elements. *See People* v. *McKenzie*, 169 Colo. 521, 458 P.2d 232 (1969). The argument is made that the first-degree assault statute requires proof of intent to cause serious bodily injury, together with infliction of serious bodily injury with a deadly weapon. The prosecution contends that neither is an element under the criminally-negligent homicide statute. These arguments are unpersuasive.

The defendant is not challenging the constitutionality of the penalty on the basis that all defendants charged with either crime are always similarly situated in terms of the equal protection clause. *U. S. Const.*, Amend. XIV. Only those defendants who establish that their actions were done in the good faith, but unreasonable belief, that justification existed are claimed to be similarly situated. When so considered, it is clear that the elements of intent and injury through the use of a deadly weapon do not serve to distinguish the two statutes.

Under subsection (b) of the criminally-negligent homicide statute, the prosecution must prove that the defendant

intended to cause the death of another person.[7] Additionally, the fact that the statute does not require that death result from the use of a deadly weapon is not determinative. The deadly weapon requirement under the first-degree assault statute was intended and does distinguish that statute from the second-degree assault statute. *People* v. *Martinez*, 189 Colo. ....., 540 P.2d 1091 (1975). When death is intentionally caused by a defendant, it will be rare that a deadly weapon will not be used. This is especially true since the statutory definition of "deadly weapon" includes any object used in a manner that is capable of producing death or bodily inujry. 1971 Perm. Supp., C.R.S. 1963, section 40-1-1001(3)(e).[8] *See Grass* v. *People*, 172 Colo. 223, 471 P.2d 602 (1970); *Armijo* v. *People*, 134 Colo. 344, 304 P.2d 633 (1956).

The present case is analogous to *Calvaresi*, *supra*, in which the intent elements of the two statutes were held to be not sufficiently distinguishable to warrant different penalties. In the present case, the intent and conduct proscribed by the first-degree assault statute and subsection (b) of the criminally-negligent homicide statute are not sufficiently distinguishable to justify a greater penalty when that conduct results in serious bodily injury rather than in death. The penalty prescribed for persons convicted of first-degree assault who establish that their actions were done in the good faith, but unreasonable belief, that justification existed is, therefore, unconstitutional as a denial of the equal protection of the law.

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[7]As a result of H.B. 1654 (1977), the criminally-negligent homicide statute now requires proof of a lesser degree of mental culpability than does the first-degree assault statute. ("Knowingly," as compared to "with the intent.") Consequently, this decision applies only to persons charged with first-degree assault prior to July 1, 1977.

[8]Now section 18-1-901 (3) (e), C.R.S. 1973.

It is clearly within the legislature's prerogative to establish the penalties and the defenses which shall apply to specific criminal offenses. But legislative enactments are always subject to constitutional constraints. In this case, we extend one such legislatively created defense to the crime of first-degree assault because that defense is available under the criminally-negligent homicide statute and both statutes proscribe similar conduct and intent. We expressly hold that the good faith but unreasonable belief defense is not available for other crimes by virtue of this case. The matter properly lies with the legislature subject to the limits of the constitution.

The result in this case is mandated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and Colorado's statutory provisions concerning first-degree assault, criminally-negligent homicide, and self-defense. The well-established majority rule is that a person is justified in using physical force upon another in order to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by the other person. *See* 40 *Am.Jur.2d*, Homicide § 153; *Bowman and Bowman, Defense of a Homicide Case*, 3 *Bernstein's Criminal Defense Techniques* § 50.03[2]; *State* v. *Cooper*, 47 Hawaii 345, 388 P.2d 846 (1964). The general assembly has guaranteed the affirmative defense of self-defense in Colorado. Section 18-1-704(1), C.R.S. 1973.

In addition to the traditional defense of self-defense, the Colorado legislature has expanded the defense to reduce the degree of culpability and the penalty in cases in which death results through a good faith, but unreasonable belief, that justification existed to use force. Section 18-3-105 (1) (b), C.R.S. 1973. However, the partial good faith, unreasonable belief, defense was not afforded defendants charged with first-degree assault. As this opinion indicates,

the inconsistency in the statutory scheme denied defendants charged with first-degree assault equal protection of the law.

The general assembly in Colorado has adopted the extreme minority view in authorizing a good faith, but unreasonable belief, to reduce the degree of culpability and the penalty to be imposed for a criminal offense. With the reasonableness element eliminated from the defense, the defendant need only establish that he acted in good faith. The jury is no longer presented with the task of determining whether the defendant conformed his conduct to society's norms, but only whether the defendant conformed to his own. While the wisdom of the good faith, unreasonable belief, defense must rest with the general assembly, we note that the practical effect of permitting this defense is to lessen the certainty and effectiveness of the sanctions imposed by the criminal code.

Accordingly, the judgment is reversed, and cause is remanded to the district court for a new trial. Whether the defendant acted in the good faith, but unreasonable belief, that his actions were justified is an issue for the jury to determine. If the affirmative defense is raised, and if the jury determines that the defendant acted with the good faith, but unreasonable belief, that his actions were justified, the sentence imposed can be no greater than that which could be imposed upon a defendant under the criminally-negligent homicide statute.

MR. JUSTICE LEE and MR. JUSTICE CARRIGAN do not participate.

APPENDIX B

IN THE SUPREME COURT
OF
COLORADO

NO. 27257

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v.

WILLIAM (RUSTY) BRAMLETT,
Defendant-Appellant

Appeal From the District Court of Sedgwick County
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EN BANC JUDGMENT REVERSED AND
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[1]Now section 18-3-202(1) (a), C.R.S. 1973.
[2]Now section 18-3-105, C.R.S. 1973.

1971 Perm. Supp., C.R.S. 1963, section 40-3-202, provides, in part:

> "(1) A person commits the crime of assault in the first degree if:
>
> "(a) With intent to cause serious bodily injury to another person, he causes serious injury to any person by means of a deadly weapon."

Assault in the first degree is a class three felony which carries a minimum sentence of five years and a maximum sentence of forty years in the state penitentiary. 1971 Perm. Supp., C.R.S. 1963, section 40-1-105.[3]

The defendant interposed a defense of self-defense as authorized by 1971 Perm. Supp., C.R.S. 1963, sections 40-1-804(1):[4]

> "Except as provided in subsection (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose."

This defense is expanded to include unreasonable beliefs to reduce the degree of culpability in cases in which death results by the criminally-negligent homicide statute:

"1971 Perm. Supp., C.R.S. 1963, section 40-3-105.

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[3]Now section 18-1-105, C.R.S. 1973.
[4]Now section 18-1-704(1), C.R.S. 1973.

"(1) A person commits the crime of criminally negligent homicide if he causes the death of another person:

"(a) By conduct amounting to criminal negligence; or (b) He intentionally causes the death of a person in the good faith but unreasonable belief that one or more grounds for justification exist under sections 40-1-801 to 40-1-807."

Criminally-negligent homicide is a class one misdemeanor which carries a penalty of from six months to two years in jail. 1971 Perm. Supp., C.R.S. 1963, section 40-1-106.[5]

The defendant relies on *People* v. *Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975), in which we held the manslaughter statute unconstitutional because its intent requirement was not sufficiently distinguishable from the intent requirement for the lesser included offense of criminally-negligent homicide. In *Calvaresi*, we declared:

"Equal protection of the law is a guarantee of like treatment of all those who are similarly situated. Classification of persons under the criminal law must be under legislation that is reasonable and not arbitrary. There must be substantial differences having a reasonable relationship to the persons involved and the public purpose to be achieved. *Dunbar* v. *Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970). A statute which prescribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws. *See People* v. *McKenzie*, 169 Colo. 521, 458 P.2d 232 (1969); and *State* v.

[5]Now section 18-1-106, C.R.S. 1973.

Pirkey, 203 Ore. 697, 281 P.2d 698 (1955), and cases cited therein."

The validity of the approach set forth in *Calvaresi* was reaffimed in *People* v. *Dominguez*, ... Colo. ....., 568 P.2d 54 (1977). In *Dominguez*, we held a portion of the first-degree assault statute unconstitutional because the type of conduct proscribed under the statute was not substantially different from the conduct proscribed under the second-degree assault statute.

The prosecution attempts to sustain the validity of the penalty under the first-degree assault statute in the present case on the ground that the two statutes establish distinct crimes which require proof of different elements. *See People* v. *McKenzie*, 169 Colo. 521, 458 P.2d 232 (1969). The argument is made that the first-degree assault statute requires proof of intent to cause serious bodily injury, together with infliction of serious bodily injury with a deadly weapon. The prosecution contends that neither is an element under the criminally-negligent homicide statute. These arguments are unpersuasive.

The defendant is not challenging the constitutionality of the penalty on the basis that all defendants charged with either crime are always similarly situated in terms of the equal protection clause. *U. S. Const.*, Amend. XIV. Only those defendants who establish that their actions were done in the good faith, but unreasonable belief, that justification existed were claimed to be similarly situated. When so considered, it is clear that the elements of intent and injury through the use of a deadly weapon do not serve to distinguish the two statutes.

Under subsection (b) of the criminally-negligent homicide statute, the prosecution must prove that the defendant

intended to cause the death of another person. Additionally, the fact that the statute does not require that death result from the use of a deadly weapon is not determinative. The deadly weapon requirement under the first-degree assault statute was intended and does distinguish that statute from the second-degree assault statute. *People* v. *Martinez*, 189 Colo. ....., 540 P.2d 1091 (1975). When death is intentionally caused by a defendant, it will be rare that a deadly weapon will not be used. This is especially true since the statutory definition of "deadly weapon" includes any object used in a manner that is capable of producing death or bodily injury. 1971 Perm. Supp., C.R.S. 1963, section 40-1-1001(3)(e).[6] *See Grass* v. *People*, 172 Colo. 223, 471 P.2d 602 (1970); *Armijo* v. *People*, 134 Colo. 344, 304 P.2d 633 (1956).

The present case is analogous to *Calvaresi, supra*, in which the intent elements of the two statutes were held to be not sufficiently distinguishable to warrant different penalties. In the present case, the intent and conduct proscribed by the first-degree assault statute and subsection (b) of the criminally-negligent homicide statute are not sufficiently distinguishable to justify a greater penalty when that conduct results in serious bodily injury rather than in death. The penalty prescribed for persons convicted of first-degree assault who establish that their actions were done in the good faith, but unreasonable belief, that justification existed is, therefore, unconstitutional as a denial of the equal protection of the law.

The result in this case is mandated by the equal protection clause of the Fourteenth Amendment to the United States Constitution and Colorado's statutory provisions concerning first-degree assault, criminally-negligent homi-

[6]Now section 18-1-901(3)(e), C.R.S. 1973.

cide, and self-defense. The well-established majority rule is that a person is justified in using physical force upon another in order to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by the other person. *See* 40 *Am.Jur.2d*, Homicide § 153; *Bowman and Bowman, Defense of a Homicide Case*, 3 *Bernstein's Criminal Defense Techniques* § 50.03[2]; *State* v. *Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968); *State* v. *Clyde*, 47 Hawaii 345, 388 P.2d 846 (1964). The general assembly has guaranteed the affirmative defense of self-defense in Colorado. Section 18-1-704(1), C.R.S. 1973.

In addition to the traditional defense of self-defense, the Colorado legislature has expanded the defense to reduce the degree of culpability and the penalty in cases in which death results through a good faith, but unreasonable belief, that justification existed to use force. Section 18-3-105 (1)(b), C.R.S. 1973. However, the partial good faith, unreasonable belief, defense was not afforded defendants charged with first-degree assault. As this opinion indicates, the inconsistency in the statutory scheme denied defendants charged with first-degree assault equal protection of the law.

The general assembly in Colorado has adopted the extreme minority view in authorizing a good faith, but unreasonable belief, to reduce the degree of cuplability and the penalty to be imposed for a criminal offense. With the reasonableness element eliminated from the defense, the defendant need only establish that he acted in good faith. The jury is no longer presented with the task of determining whether the defendant conformed his conduct to society's norms, but only whether the defendant conformed to his own. While the wisdom of the good faith, unreasonable belief, defense must rest with the general assembly, we note that the practical effect of permitting this defense

is to lessen the certainty and effectiveness of the sanctions imposed by the criminal code.

Accordingly, the judgment is reversed, and cause is remanded to the district court for a new trial. Whether the defendant acted in the good faith, but unreasonable belief, that his actions were justified is an issue for the jury to determine. If the affirmative defense is raised, and if the jury determines that the defendant acted with the good faith, but unreasonable belief, that his actions were justified, the sentence imposed can be no greater than that which could be imposed upon a defendant under the criminally-negligent homicide statute.

MR. JUSTICE LEE and MR. JUSTICE CARRIGAN do not participate.